Supreme Court, U.S.
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No. 01-1204

IN THE

Supreme Court of the United States

LAWRENCE EPSTEIN and JOHN LINDER,

Petitioners,

v.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF IN OPPOSITION FOR RESPONDENTS FORMER MCA DIRECTORS

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PRELIMINARY STATEMENT

This opposition is respectfully submitted on behalf of the former directors of MCA INC., who were parties to the 1990-1993 proceedings in the Delaware courts. The former directors of MCA were not parties in petitioners' 1993-1999 unsuccessful collateral attack on the 1993 Delaware settlement judgment in the U.S. Court of Appeals for the Ninth Circuit and this Court — which ended with this Court's denial of certiorari from the Ninth Circuit's *Epstein III* decision on remand from *Matsushita Electric Industrial Co., Ltd.* v. *Epstein*, 516 U.S. 367 (1996) (26a–60a). *Epstein* v. *MCA, Inc.*, 179 F.3d 641 (9th Cir.) (117a–133a), *cert. denied*, 528 U.S. 1004 (1999).

REASONS FOR DENYING THE WRIT

The petition seeks this Court's review of a decision of the Delaware Supreme Court refusing to reverse, under an abuse of discretion standard, the denial of a Del. Ct. Ch. 60(b) motion to vacate a seven-year-old judgment that was previously the subject of petitioners' unsuccessful collateral attack in the federal courts, which upheld the judgment as comporting with due process and ended with this Court's denial of certiorari.

The petition would not bring before this Court any of the questions claimed to be presented for review or any disputed issue of federal or constitutional law. ***The Delaware Supreme Court decided no disputed question of federal or constitutional law.*** The petition is predicated on an egregiously distorted account of the decision of the Delaware Supreme Court and a woefully selective treatment of the other proceedings relevant to this case. And even beyond that, this

case is an exceedingly inappropriate vehicle for yet additional consideration of any issue by this Court — which has already (1) held that petitioners are "bound" by the 1993 Delaware judgment (*Matsushita*, 516 U.S. at 378 (38a)), and (2) then denied certiorari when review was sought by petitioners of the Ninth Circuit's holding in *Epstein III* that "the Delaware judgment was not constitutionally infirm and must be accorded full faith and credit." *Epstein III*, 179 F.3d at 650 (133a), *cert. denied*, 528 U.S. 1004 (1999).[1]

The petition fails on a variety of independently dispositive grounds to satisfy the standards for this Court's certiorari jurisdiction:

(1) The petition fails to raise any disputed legal question. Contrary to the petition's account, the Delaware Supreme Court did not "dispense" with the adequacy of representation requirement but, to the contrary, affirmed that requirement and, upon a careful review of the record, found it *satisfied* — a finding that confirmed the same conclusion with respect to the issue reached by the Delaware courts in the 1993 settlement proceedings and the federal courts in the 1993-1999 collateral attack. The petition thus ultimately asks this Court to review the same record as the Delaware Supreme Court, which applied settled and undisputed legal principles to a specific factual record.

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[1] The petition seeks to mask the fact that this Court denied certiorari from *Epstein III*. It cites and discusses *Epstein III* repeatedly without reference to the denial of certiorari. Pet. at V, 3, 9-10, 15. It recounts the procedural history of the case but skips over the denial of certiorari. *Id.* at 4. It mentions the denial of certiorari from *Epstein III* only once, confusingly, in the course of describing the denial of the Del. Ct. Ch. Rule 60(b) motion. *Id.* at 11.

(2) The ground for vacatur pressed by petitioners and passed on below did not put into issue the adequate representation requirement but rather questioned whether the 1993 settlement judgment satisfied the Delaware Supreme Court's own decision in *Prezant* v. *De Angelis*, 636 A.2d 915 (Del. 1994), as to the need for sufficient record findings of adequacy. That question implicates only the Delaware Supreme Court's supervisory function over the lower Delaware courts rather than any fairly presented question of federal or constitutional law.

(3) The 1993 settlement judgment in question and the record underlying it have been reviewed on multiple occasions by not only the Delaware courts, but also this Court in *Matsushita* and the Ninth Circuit in *Epstein III*, which have held the judgment binding on petitioners.

(4) Indeed, that the judgment comported with due process is a matter that is subject to collateral estoppel against petitioners by virtue of the definitive ruling against them in *Epstein III*, from which this Court denied certiorari.

(5) In all events, petitioners' own procedural jockeying — beginning with their purposefully absenting themselves from the 1993 settlement proceedings in Delaware, through the loss of their collateral attack, followed by their post-collateral-attack application below under Del. Ct. Ch. Rule 60(b) — renders this case an unsuitable vehicle for certiorari, as it comes from a decision of the Delaware Supreme Court, under an abuse of discretion standard of review, that simply affirmed the denial of post-judgment vacatur on a basis that implicates no split of legal authority on any subject.

Every issue ever raised by petitioners has been heard and addressed multiple times by multiple courts, which have been over the record of the 1993 Delaware judgment carefully and repeatedly:

(1) The claim of inadequate representation was raised in and rejected by the Delaware courts in the 1993 settlement proceedings. The Court of Chancery explicitly found in its judgment that the Delaware class plaintiffs "as representatives of the Settlement Class, have fairly and adequately protected the interests of the Settlement Class."[2] That judgment was affirmed on appeal by the Delaware Supreme Court "on the basis of and for the reasons assigned by the Court of Chancery in its Opinion dated February 12, 1993, as confirmed by the Order and Final Judgment of February 22, 1993." *In re MCA, Inc. Shareholders Litig.*, 633 A.2d 370, 1993 WL 385041 (Del. 1993). Petitioners purposefully chose in 1993 not to appear themselves in opposition to the settlement, and thus forewent the opportunity to seek this Court's review at that point.[3]

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[2] 8a; also quoted in *Matsushita*, 516 U.S. at 378-79 (37a). *See also id.* at 371, 379 n.5 (29a, 37a n.5) ("the Court [of Chancery] found the class representation adequate"; referring to "the Chancery Court's express ruling, following argument on the issue, that the class representatives fairly and adequately protected the interests of the class"). Incredibly, the petition states that "[t]he Chancery Court's [1993] opinion did not mention adequacy of representation" (Pet. at 3), notwithstanding that (1) the opinion in fact did squarely reject the objectors' adequacy of representation/"collusion" challenge, *see In re MCA, Inc. Shareholders Litig.*, 1993 WL 43024 at *5 (Del. Ch. 1993), and (2) the Court of Chancery's judgment explicitly found that the Delaware plaintiffs "have fairly and adequately protected the interests of" the class.

[3] There is no doubt that petitioners understood their right to appear and object in 1993: petitioners' principal counsel, on behalf

(Cont'd)

(2) Petitioners then raised the same contentions as they did below in their 1993-1999 unsuccessful collateral attack on the Delaware judgment in their California federal court litigation. They attacked the Delaware judgment in this Court on the appeal from *Epstein I*. This Court held that the Delaware judgment properly could release petitioners' federal securities law claims, and that: "Respondents [*i.e.*, petitioners here] do not deny that, as shareholders of MCA's common stock, they were part of the plaintiff class and that they never opted out; *they are bound, then, by the judgment*." *Matsushita*, 516 U.S. at 379 (37a-38a) (emphasis added).

(3) Petitioners then raised the same contentions on the remand to the Ninth Circuit. In *Epstein III*, the Ninth Circuit rejected all of petitioners' contentions and held that "*the Delaware judgment was not constitutionally infirm and must be accorded full faith and credit.*" *Epstein III*, 179 F.3d at 650 (133a). (*Epstein III* was filed in place of the earlier panel decision in *Epstein II*, which was withdrawn. *See id.* at 642-43 (117a-118a).)[4]

(4) Petitioners then raised the same contentions in seeking certiorari from *Epstein III*. This Court denied certiorari. 528 U.S. 1004 (1999). With that denial, all of petitioners' contentions were conclusively decided.

(Cont'd)

of *another* class member, covertly drafted one of the rejected objections to the settlement that squarely raised the adequacy of representation issue. *See* p. 16, *infra*.

[4] Unabashedly, the petition relies heavily on the *withdrawn* decision in *Epstein II* (as well as the *dissenting* opinion in *Epstein III*). *See* Pet. at, *e.g.*, 3, 8-9, 13, 14, 15, 17-18. Judge O'Scannlain's *majority* opinion in *Epstein III* is essentially ignored.

(5) Petitioners nevertheless raised some of the same contentions yet again in seeking vacatur of the 1993 judgment in their December 1999 motion in the Delaware Court of Chancery under Del. Ct. Ch. Rule 60(b). After extensive briefing and argument, the Court of Chancery denied petitioners' application as both untimely and lacking in factual support. *In re MCA, Inc. Shareholders Litig.*, 774 A.2d 272 (Del. Ch. 2000). On appeal, the Delaware Supreme Court held (en banc) that petitioners had failed to establish any basis for vacatur under Rule 60(b) and that the Court of Chancery's determination to deny Rule 60(b) relief would not be disturbed under the applicable abuse of discretion standard of review. 1a-25a.

There is no cause for this Court to entertain petitioners' contentions yet again.

A. The Delaware Supreme Court decided no issue of federal or constitutional law.

The decision of the Delaware Supreme Court to affirm the denial of vacatur by the Court of Chancery was the product of its finding "no abuse of discretion in the Court of Chancery's determination that the settlement judgment was not procured by fraud or void for a specific determination of adequacy of representation." 2a. The Delaware Supreme Court emphasized that under its state procedural law, "[a] motion to reopen a judgment under Court of Chancery Rule 60(b) is addressed to the sound discretion of the trial court," and, concomitantly, its own office in reviewing the grant or denial of such a motion was limited to review for "abuse of discretion." 12a. Indeed, as the Court noted, under Delaware practice an appeal from the grant or denial of a Del. Ct. Ch. Rule 60(b) motion "'does not permit the

appellant to attack the underlying judgment for an error which he could have complained of on appeal from it.'" 13a, quoting *Swann* v. *Carey*, 272 A.2d 711, 712 (Del. 1970).

In particular, the Delaware Supreme Court rejected the petitioners' position that their Del. Ct. Ch. Rule 60(b)(4) "voidness" contention — that "Vice Chancellor Hartnett's [1993] finding of adequate representation was not supported by the record" (13a at n.8) — should be reviewed de novo. The Court held, as a matter of state law practice, that petitioners' "assertion, when subsequently addressed by the Chancellor, required the court to examine the conduct of the parties, as well as the perceived intention of the court entering the judgment, a weighing process that necessarily requires deference from a reviewing court." *Id.*

The decision of the Delaware Supreme Court to affirm the Chancellor's denial of post-judgment vacatur under Del. Ct. Ch. Rule 60(b) decided no question of federal or constitutional law. The Delaware Supreme Court carefully addressed each of petitioners' two contentions: (1) that Vice Chancellor Hartnett, in approving the settlement in 1993, had no sufficient record on the class plaintiffs' adequacy of representation; and (2) that Delaware class counsel had perpetrated a fraud on the court, by allegedly duping the Vice Chancellor into signing the judgment without reading or understanding it. The Delaware Supreme Court reviewed the Chancellor's decision and the petitioners' contentions; found those contentions unsupported and unavailing; and determined to affirm the denial of the petitioners' motion to vacate as there was no abuse of discretion in the Chancellor's denial of petitioners' motion.

The issue below was emphatically *not* whether adequate representation is necessary before a class settlement is given

preclusive effect, or even whether there in fact had been adequate representation afforded to the class in the 1993 Delaware settlement judgment. Indeed, all issues of that constitutional dimension were foreclosed by the *Epstein III* decision of the Ninth Circuit (*see* pp. 17-18, *infra*), and, in all events, the record below included evidence attesting to the standing and adequacy of the Delaware class plaintiffs (*see* pp. 9, 11-12, *infra*). The issue pressed below by petitioners was the *procedural* and *record-specific* issue whether there had been a sufficient record finding made in the 1993 Delaware settlement proceedings to satisfy the requirements of the Delaware Supreme Court's subsequent 1994 decision in *Prezant* v. *De Angelis*, 636 A.2d 915 (Del. 1994).[5] In *Prezant*, the Delaware Supreme Court held that in a class action settlement, "the appropriate course is for the Court of Chancery to make an explicit finding on the record that the action satisfies the criteria of Rule 23 and is thus properly maintainable as a class action." *Prezant*, 636 A.2d at 924. *Prezant* in effect is a state rule of procedure for

[5] Petitioners' moving brief in the Court of Chancery stated their point as follows:

> THIS COURT'S APPROVAL OF THE SECOND SETTLEMENT DID NOT AND CANNOT SATISFY THE INQUIRY REQUIRED BY *PREZANT v. DE ANGELIS* AS TO ADEQUACY OF REPRESENTATION.

Similarly, in the Delaware Supreme Court, petitioners stated their point as follows:

> Class Counsel's Failure to Submit Record Evidence Concerning the Named Plaintiffs' Adequacy and the Court of Chancery's Failure to Inquire Into the Named Plaintiffs' Adequacy Require Reopening the Judgment as Void Under *Prezant v. De Angelis*.

the handling of class action settlements by the Delaware Court of Chancery; it did not purport to establish or modify any constitutional requirements.

In the decision below, the Delaware Supreme Court held that its *Prezant* decision "was not binding on the Court of Chancery at the time the Settlement was approved in this case." 18a. *See also* 18a-19a ("the Vice Chancellor [in 1993] was not required, pre-*Prezant*, to make an explicit finding of adequate representation on the record at the Settlement Hearing"). The Delaware Supreme Court further noted that due process nonetheless "did require recognition by the court of adequate representation by the named plaintiffs" and that "[t]he Chancellor did determine . . . that the class was appropriately afforded due process. *See MCA III*, 774 A.2d at 278" (18a-19a) — finding that "'[t]he [Chancery] Court [in 1993] specifically addressed (and rejected) the objectors' collusion argument — which went to the heart of the adequate representation issue.'" 18a, quoting *MCA III*, 774 A.2d at 278. The Delaware Supreme Court itself found, with regard to the Vice Chancellor's 1993 rejection of the "collusion" argument: "Implicit in this finding is a consideration of the adequacy of the representation by the class plaintiffs." 21a. Accordingly, the Delaware Supreme Court affirmed the Chancellor's denial of vacatur as not an abuse of discretion. *Id.*

There is certainly no reason for this Court to entertain the contention that the Delaware Supreme Court erred in holding that its own decision in *Prezant* was not violated by the 1993 Delaware judgment. And even petitioners shrink from the exorbitant suggestion inherent in their position that any class settlement — however long ago entered into, wherever in the nation made, and however clear the indicia

of adequacy — is subject to vacatur unless the presiding court complied with *Prezant*'s procedural protocols.

On petitioners' second contention below — that the 1993 settlement judgment had been procured by fraud on the court by class counsel — the Delaware Supreme Court likewise held that the Court of Chancery did not abuse its discretion in denying the motion to vacate. The Delaware Supreme Court noted that "the Chancellor found that there was no evidence to support the accusation that class counsel duped the Vice Chancellor [in 1993] into signing the final judgment or order without understanding it or reading it." 22a. The Court indeed noted that the Chancellor had found that "no evidence whatsoever supports [petitioners' fraud claim], let alone evidence capable of meeting the high Rule 60(b) standard, which requires 'the most egregious conduct involving a corruption of the judicial process itself.'" *Id.*, quoting *MCA III*, 774 A.2d at 280. The Court found all of petitioners' fraud claims unfounded in fact. 23a-25a.

The characterization of the Delaware Supreme Court decision in the petition is thus a gross distortion, if not worse — flatly mischaracterizing the decision below to create the impression of a question of law where none in fact exists. The Delaware Supreme Court did not "dispense" with the adequacy of representation requirement. Pet. at 11, 14. It did not decide that a state court could certify a class "without any record evidence that the representatives are class members or of their adequacy." *Id.* at i. It did not hold that the opt-out right is "a constitutionally sufficient substitute for adequacy of representation." *Id.* It did not hold that the "experience" of the court or of class counsel were "constitutionally cognizable substitutes for record evidence of standing and of adequacy." *Id.*; *see id.* at 4-5, 16.

The Delaware Supreme Court referred to the 1993 Vice Chancellor as "an experienced jurist with extensive familiarity with the intricacies of class and derivative settlements" only in rejecting as unfounded petitioners' extraordinary claim that the Vice Chancellor had been duped into signing the judgment, which contained an explicit finding that the plaintiffs adequately represented the class, without reading or understanding what he was signing. 24a. And it referred to the "experience" of Delaware class counsel in shareholder litigation in the course of recounting that the Court of Chancery in 1993 had rejected the charge that they had "colluded" with the defendants, noting that class counsel had "conducted extensive pre-trial discovery" and "their own analysis of the governing law, permitting them to evaluate the merits of both the Delaware and the federal claims." 20a. For petitioners to pretend to this Court that the Delaware Supreme Court "dispensed with" the adequate representation requirement, or held that the "experience" of a court or counsel can substitute for that requirement, is an unfortunate but blatant misrepresentation.

Far from "dispensing" with the adequate representation element, the decision of the Delaware Supreme Court explicitly affirmed that the requirement is not only embodied in Del. Ct. Ch. Rule 23(a)(4) but is of "constitutional dimensions rooted in the Due Process Clause of the United States Constitution," and that the requirement is "in addition" to the elements of notice, opportunity to be heard and the right to opt out. 16a-17a (citing U.S. Supreme Court authorities). Contrary to the petition, the Delaware Supreme Court has not run amok, "dispensing" with or "misapprehending" settled constitutional requirements.

The Delaware Supreme Court held that, while its 1994 procedural requirement in *Prezant* of explicit findings had not been binding on the Court of Chancery when it rendered its 1993 decision, the due process concerns embraced by

Prezant were applicable *and were satisfied* by the record of the 1993 judgment. 18a-21a. In so finding, the Delaware Supreme Court relied upon (1) the Chancellor's determination below, on review of the 1993 record, that "the class was appropriately afforded due process" (18a); (2) the Chancellor's having "found" that "'[t]he Court [of Chancery in 1993] specifically addressed (and rejected) the objectors' collusion argument — which went to the heart of the adequate representation issue.' *See MCA III*, 774 A.2d at 278" (18a); (3) the fact that the Court of Chancery's 1993 finding of no collusion was the equivalent of finding arm's-length negotiation (20a); (4) the fact that the Court of Chancery's 1993 analysis of the settlement "no doubt" included "implicitly considering the adequacy of the class plaintiffs' representation" (21a); and (5) as to the Court of Chancery's 1993 specific consideration and rejection of the collusion claim, "[i]mplicit in this finding is a consideration of the adequacy of the representation by the class plaintiffs" (21a).

The petition in effect would ask this Court to now review these record findings yet again. Indeed — and this point merits emphasis — that is all petitioners can ask this Court to do. There is no disputed question of law. All agree that Delaware requires adequacy of representation before a class judgment will be given preclusive effect. Recognizing fully this principle of law, the Delaware Supreme Court carefully reviewed the record in this case and found ample, appropriate evidence of adequate representation. Petitioners now ask this Court to review the same record as the Delaware Supreme Court, under the same settled legal principles, and under the same abuse of discretion standard of review, in their continuing quest to challenge a nine-year-old judgment that has been approved by courts at every level of the state and federal judiciary. Such is manifestly not the office of this Court.

The Delaware Supreme Court's finding that the record of the 1993 settlement judgment satisfied the concerns underlying its own *Prezant* precedent certainly raises no issue appropriate for this Court's review. Indeed, petitioners previously — and unsuccessfully — relied heavily on *Prezant* in their failed collateral attack before both this Court and the Ninth Circuit. Both *Matsushita* and *Epstein III* cited *Prezant* in the course of holding that petitioners were bound by the Delaware judgment, and both held that *Prezant* had been satisfied by the 1993 settlement proceedings in the Court of Chancery. In *Matsushita*, this Court stated:

> As required by Delaware Court of Chancery Rule 23, *see Prezant* v. *De Angelis*, 636 A.2d 915, 920 (1994), the Court of Chancery found, and the Delaware Supreme Court affirmed, that the settlement was "fair, reasonable and adequate and in the best interests of the . . . Settlement class" and that notice to the class was "in full compliance with . . . the requirements of due process." . . . The Court of Chancery "further determined that the plaintiffs[,] . . . as representatives of the Settlement Class, have fairly and adequately protected the interests of the Settlement Class."

Matsushita, 516 U.S. at 378-79 (36a-37a) (certain citations omitted). *Epstein III* likewise rejected petitioners' *Prezant* claim:

> We note that Delaware law provides no basis for the collateral review that the Epstein appellants seek. As the Court stated in *Matsushita*, "a Delaware court would afford preclusive effect to the settlement judgment in this case." 516 U.S. at

> 378. . . . As noted by the Court in *Matsushita*, the Delaware Chancery Court made the requisite findings, *see* 516 U.S. at 378-79, . . . thus under *Prezant*, Matsushita is protected from a collateral attack on the validity of the settlement.

Epstein III, 179 F.3d at 647 n.6 (128a-129a).

It goes without saying that the Delaware Supreme Court is the ultimate authority on matters of Delaware law. *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 413 n.7 (1984). What the Delaware Supreme Court decided below was a matter of Delaware law: whether petitioners had made the showing necessary for the extraordinary relief of post-judgment vacatur under a state rule of procedure predicated on the asserted violation of Delaware's own *Prezant* precedent (and the obviously state law issue of fraud on the court). There is no federal interest in that subject. Any federal interest in petitioners' contentions was exhausted when their federal court collateral attack was resolved with the denial of certiorari from *Epstein III*.

B. Other grounds confirming the inappropriateness of this case for certiorari

There are numerous additional grounds that further confirm the inappropriateness of this case for certiorari, and which indeed independently support the result reached by the Delaware Supreme Court — the decision to affirm the denial of a seven-year-post-judgment, post-collateral attack motion for vacatur under Del. Ct. Ch. Rule 60(b).

1. Delaware law of the case

The Delaware Supreme Court noted that the basis of its affirmance "obviate[d] the need to address the argument that the adequacy issue is settled by the law of the case." 21a n.13. In the undoubtedly unique factual and procedural circumstances here, the law of the case indeed would have compelled the same result, *i.e.*, rejection of petitioners' contention that the 1993 judgment should be vacated.

The 1993 proceedings in the Delaware courts focused front and center on the question of adequate representation.[6] The Court of Chancery rejected the objectors' adequacy of representation/"collusion" challenges, and specifically determined in its Order and Final Judgment "that the plaintiffs[,] . . . as representatives of the Settlement Class, have fairly and adequately protected the interests of the Settlement Class" (quoted in *Matsushita*, 516 U.S. at 378-79 (37a)). That decision was then affirmed by the Delaware Supreme Court. As the Chancellor below noted, the Court of Chancery decision affirmed by the Delaware Supreme Court in 1993 "specifically addressed (and rejected) the objectors' collusion argument — which went to the heart of the adequate representation issue." *MCA III*, 774 A.2d at 278.

The 1993 adequate representation determination is law of the case and not subject to reconsideration upon petitioners'

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[6] In the Court of Chancery, the objectors argued that the Delaware class representatives "did not provide adequate representation to the class" as the settlement was allegedly "collusive." In the appeal to the Delaware Supreme Court, the objectors likewise argued that the settlement was the product of inadequate representation of the class, contending that the Delaware plaintiffs had agreed to a "collusive" settlement.

Del. Ct. Ch. Rule 60(b) motion. Under settled Delaware practice, a court under Rule 60(b) will not entertain reargument of any issue previously decided by it — here, its determination of adequacy of representation — absent a sufficient showing of fraud of the sort cognizable under the strictly limited standards of Rule 60(b)(3) (which showing petitioners failed to make below, and do not even attempt in their petition), or a showing sufficient for vacatur under one of the other subsections of the Rule (none of which was even claimed here). Delaware practice makes clear that Del. Ct. Ch. Rule 60(b)(4) is not about reargument of a point already decided; it is not a substitute for an appeal; it is not an avenue to ask anew whether the prior ruling was correctly decided. *E.g.*, *Teal* v. *Moor*, 1999 WL 167791, at *1 (Del. Super. Ct. Mar. 2, 1999); *Competex, S.A.* v. *Labow*, 783 F.2d 333, 335 (2d Cir. 1986); *Swam* v. *United States*, 327 F.2d 431, 433 (7th Cir. 1964).

Indeed, there is a uniquely strong ground to apply law of the case here. Petitioners here cannot even entirely claim to have elected not to participate in the 1993 proceedings on the settlement by the Delaware courts. Petitioners' counsel — while they have claimed to have "strategically" absented themselves from the 1993 Delaware settlement hearing — nevertheless also concurrently *and covertly* drafted an objection that was filed, heard and rejected in those settlement proceedings (the Krupman objection). The drafting of the Krupman objection by petitioners' principal counsel (the Kirby firm) was uncovered only in discovery and then admitted by Krupman's counsel at the 1993 settlement hearing. That objection advanced essentially the same attack on the Delaware settlement and adequacy of representation that petitioners later advanced in their unsuccessful collateral attack. The covert participation in that failed objection presents an unusually strong case for application here of law of the case against petitioners.

2. Collateral estoppel by *Epstein III*

Even apart from the preclusiveness *vel non* of the 1993 Delaware decisions, no federal or constitutional issues remain for decision following the Ninth Circuit's 1999 decision in *Epstein III*, from which this Court denied certiorari.

In its 1996 decision in *Matsushita*, this Court reversed *Epstein I* as to the preclusiveness of the Delaware settlement, and expressly held that petitioners were "bound" by the 1993 Delaware settlement judgment. *Matsushita*, 516 U.S. at 379 (38a). On the remand, petitioners re-urged before the Ninth Circuit their attack on the Delaware judgment — including the same *Prezant* contention they raised below under Del. Ct. Ch. Rule 60(b). Petitioners argued to the Ninth Circuit that the "crucial issue" before it was "whether the Delaware proceeding as a whole was consistent with due process," that there had been "constitutionally inadequate class representation," and that the Delaware courts had afforded "constitutionally inadequate judicial supervision of the settlement proceeding." Petitioners specifically argued to the Ninth Circuit that due process required a finding of adequate representation based on "record evidence"; that there were "No Class Representative Findings or Record" in Delaware; and, therefore, that the Delaware Supreme Court's *Prezant* decision had been violated. Petitioners urged that the Ninth Circuit should, notwithstanding *Matsushita*, refuse to give effect to the Delaware settlement on the basis of their due process attack and, importantly, the Delaware Supreme Court's decision in *Prezant*. Petitioners thus raised the exact same point in the Ninth Circuit that they raised below.

The Ninth Circuit's decision in *Epstein III* squarely rejected petitioners' position, and held that the Delaware

judgment was binding on petitioners. *Epstein III* withdrew the earlier panel decision in *Epstein II* in its entirety and "consider[ed] anew whether the Epstein appellants are bound by the Delaware judgment." 179 F.3d at 643, 644 (118a, 120a). The *Epstein III* opinion of the Ninth Circuit, authored by Judge O'Scannlain (who had dissented in the withdrawn *Epstein II* decision), concluded that "the Delaware judgment was not constitutionally infirm and must be accorded full faith and credit." *Id.* at 650 (133a). Petitioners' loss was total and complete, and became final and conclusive when certiorari was denied.

Under familiar principles of issue preclusion (collateral estoppel), the Ninth Circuit decision in *Epstein III* is preclusive of petitioners' ability to continue to litigate further any constitutional issues regarding the Delaware judgment, as well as their subsidiary *Prezant* contention that they litigated and lost (*see* p. 17, *supra*). Petitioners cannot re-litigate here what they lost there.[7]

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[7] Seeking to evade the dispositive import of *Epstein III*, petitioners made the truly bizarre argument below that the Ninth Circuit's final word on the subject can be ignored because, they said, there was "no majority opinion in *Epstein III*." Petitioners' Br. to the Del. Sup. Ct. at 38. That is flatly false. Judge O'Scannlain's Opinion for the court was expressly "filed in . . . place" of *Epstein II*'s majority opinion (179 F.3d at 642 (117a); *see id.* at 643 (118a): "We now withdraw our previous opinion, *Epstein II*, and substitute this opinion for it in all respects."). Concurring, Judge Wiggins recognized that Judge O'Scannlain's opinion was the "*majority* opinion." *Id.* at 650 (134a) (emphasis added). Judge Thomas in dissent also termed Judge O'Scannlain's Opinion the "*majority*" decision — no fewer than nine separate times. *See id.* at 651, 652, 654, 655 n.3, 656 (136a, 137a, 138a, 142a, 145a, 146a) (emphasis added). Surely, if Judge Wiggins and Judge Thomas agree that Judge O'Scannlain's opinion was the "majority" opinion of the Ninth Circuit, there is no room for petitioners to suggest otherwise.

3. Procedural posture

Even apart from the final rejection of all of petitioners' contentions in *Epstein III*, the petition further presents an exceedingly poor vehicle for consideration of any federal issues — even if there were any — because of the procedural posture created by petitioners' litigation strategy. Petitioners had a full opportunity to raise any objections to the 1993 settlement judgment before it was entered and, if unsuccessful, to seek review directly in this Court. Petitioners chose not to do so. As a result, the present petition arises from the Delaware Supreme Court's decision on the appeal of the denial of a Del. Ct. Ch. Rule 60(b) motion, which as a matter of state procedural law was an abuse of discretion review and "'does not permit the appellant to attack the underlying judgment for an error which he could have complained of on appeal from it.'" 13a (citation omitted).

There is no excuse for petitioners' having foregone the opportunity to raise whatever objections they had in the 1993 proceedings in Delaware and, then, directly to this Court. As this Court itself admonished in *Matsushita*:

> If class action plaintiffs wish to preserve absolutely their right to litigate exclusively federal claims in federal court, they should either opt out of the settlement or object to the release of any exclusively federal claims.

Matsushita, 516 U.S. at 385 (44a). Petitioners chose not to opt out, not to object directly, to collaterally attack the judgment, and they lost. The present procedural posture — the denial of a seven-year-post-judgment, post-collateral-attack motion under Del. Ct. Ch. Rule 60(b) — is of petitioners' own making and is emphatically not one in which

this Court should be called upon to review yet again any of petitioners' now-thrice-rejected contentions.

4. Procedural untimeliness

The extreme untimeliness of petitioners' application below, by itself, required its denial. Petitioners moved under Del. Ct. Ch. Rule 60(b) in December 1999, approximately seven years after the judgment was entered and the settlement thereunder consummated. Under Delaware practice, such untimeliness, by itself, warrants denial of any application for post-judgment relief, particularly where (as here) the movants failed to take available steps to protect their interests (by either opting out or objecting before the settlement was approved). *E.g.*, *In re U.S. Robotics Corp. Shareholders Litig.*, 1999 WL 160154, at *9 (Del. Ch. Mar. 15, 1999); *Phillips* v. *Siano*, 1999 WL 1225245, at *4 (Del. Super. Ct. Oct. 29, 1999); *Dugan* v. *Dineen*, 1990 WL 82719, at *5-6 (Del. Ch. June 12, 1990); *Wion* v. *National Recreation Prods., Inc.*, 1980 Del. Ch. LEXIS 561 (Del. Ch. Dec. 5, 1980). Courts presented with Rule 60(b) applications "have been unyielding in requiring that a party show good reason for the failure to take appropriate action sooner." 11 Wright, Miller & Kane, *Federal Practice and Procedure* § 2857, at 260 (1995) (collecting cases).

Petitioners could have raised in Delaware in 1993 all the issues they press now. Indeed, the role of petitioners' counsel in covertly drafting an objection to the 1993 settlement makes clear beyond doubt that petitioners were aware of these issues. While the Delaware Supreme Court chose to affirm on the "merits" of petitioners' contentions, the untimeliness of their application, by itself, fully and compellingly supports the determination by the Delaware courts to deny their application and strongly counsels against the petition to this Court. There is simply no reason to excuse petitioners' untimeliness or to reward their procedural gamesmanship.

5. The erroneous factual premise of petitioners' complaint

While petitioners argue that the 1993 record was deficient as to the record evidence of the Delaware plaintiffs' standing or adequacy, they ignore the incontrovertible fact that the Delaware plaintiffs had standing as to both the state and federal claims subject to the settlement and were thus fully adequate representatives, as the Delaware courts found as a factual matter in the 1993 judgment. The record below includes uncontroverted affidavits attesting to the Delaware plaintiffs' standing. Moreover, one of the Delaware class complaints was filed by petitioners' own principal counsel who doubtless were always aware of the adequacy of that plaintiff (counsel subsequently withdrew from that representation in favor of their separate California federal action). Petitioners' entire argument in this regard is nothing but a sham.

It may be that petitioners now wish that they had objected to the fairness of the settlement in 1993. They chose not to do so. It may be that petitioners now wish they had opted out of the Delaware class. They chose not to do so. They chose to take the consideration payable to them under the 1993 settlement judgment. *They took the money.* They ought not be heard now to complain about the settlement, and certainly not when all they can proffer is, on its face, at best a phantom complaint concerning a much-reviewed, universally approved nine-year-old record.

Petitioners cannot say what possible point there would be in this Court's considering (yet again) whether to order the re-opening of a nine-year-old judgment — after the class, *including petitioners*, have received the settlement payment thereunder — so that uncontroverted affidavits attesting to the class plaintiffs' standing as adequate representatives can be refiled.

Surely even petitioners cannot mean that any court should consider anew whether the long-consummated settlement was fair in light of the *post-settlement* Ninth Circuit decision in *Epstein I* on the viability of the federal claims in that case.[8] The fairness of a settlement must be judged, as was the case here, as of the time it is agreed to, and post-judgment changes in the law can never be the basis for vacatur under Rule 60(b). *E.g.*, *Collins* v. *Wichita*, 254 F.2d 837, 839 (10th Cir. 1958); *Berryhill* v. *United States*, 199 F.2d 217, 219 (6th Cir. 1952).[9]

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[8] While the petition asserts that the federal claims were worth billions (Pet. at 3, 5), that assertion is based on an impermissible *ex post* perspective and is, even apart from that, errant speculation. On the Wasserman transaction claim, *Epstein I* remanded for further proceedings on whether there were any damages at all. *Epstein* v. *MCA, Inc.*, 50 F.3d 644, 657 (9th Cir. 1995). The defendants in *Epstein I* had previously adduced expert evidence that in fact what Wasserman received was *not* of greater value than what the class of tendering shareholders received, in which case the claim would be worthless. On the Sheinberg claim, *Epstein I* remanded for further proceedings, holding only "that plaintiffs' circumstantial evidence gives rise to a disputed issue of material fact" such that "[a] trier of fact could decide . . . not to credit Matsushita's explanation for the Sheinberg payment." *Id.* at 658. Even giving *Epstein I* its maximum due, it is hardly a basis for pretending that the federal claims were determined to be money good claims worth billions of dollars.

[9] The rule could hardly be otherwise. Every settlement is predicated on uncertainty as to the future, including the risks inherent in litigation and the possibility that the law may change. If a settling party could, several years later, decide in hindsight that the settlement was too small (or too large) and return to court to have the settlement set aside, no litigant would ever settle a claim. Can it be that if *Epstein I* had affirmed the dismissal of the federal claims, the *defendants* could have come back to the Delaware courts to have the settlement set aside, because $2 million was too *much* to pay to settle the state law claims and non-existent federal claims? Of course not.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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